

Equitable Adjustment Training

HQ AFMC/PKPC

Equitable Adjustment Definition

- No FAR/DFARS definition
- Definition of “equitable” according to Webster:
 - “Characterized by equity...fair to all concerned...without prejudice, favor, or rigor entailing undue hardship...that can be sustained or made effective in a court of equity of upon principles of equity jurisprudence.”
- Courts and BCA have relied upon such concepts as “fair and reasonable” and legal precedent to define equitable

Equitable Adjustment

Why needed?

- Equitable adjustments are necessitated by a change to the contract effort
 - Addition of work
 - Deletion of work
 - Substitution of one item for another
- Changes in contract effort may result from
 - Overt change in government requirements
 - Change in conditions surrounding the contract
 - Differing site conditions
 - Late delivery of GFP

Equitable Adjustment

Additional Definitions

- What is the difference between a claim, a change pursuant to the “Changes” clause and an equitable adjustment?
 - An equitable adjustment is the means to implement an adjustment in the contract price or the delivery schedule based upon a change to the contract
 - Both a claim and a “Changes” clause change may result in an equitable adjustment
 - FAR procedures for an equitable adjustment are involved when there is a change in conditions surrounding contract (Gov’t Prop.)
 - A claim is a written demand by one of the contracting parties seeking the payment of money, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract.

Equitable Adjustment Certification Requirement

- DFARS 243.204-70 requires certification of requests for equitable adjustment that exceed the simplified acquisition threshold (\$100,000)
- The aggregate (absolute value) amount of both the increased and decreased costs shall be used in determining when the dollar threshold requiring certification is met
- Certification in DFARS 252.243-7002
 - “I certify that the request is made in good faith, and that the supporting data are accurate and complete to the best of my knowledge and belief.”

Equitable Adjustment Objectives

- The contractor should not be in a better or worse profit position on the unchanged work after the change was made than before the change
- Price adjustments should include:
 - Direct cost of added work;
 - Estimated direct cost of deleted work not performed;
 - Indirect costs affected by the change; and
 - Profit / fee affected by the change

Equitable Adjustment Approaches

- Reasonable cost
- Jury verdict
- Total cost
- Reasonable value

Equitable Adjustment

Reasonable Cost

- Best approach to pricing an equitable adjustment
 - Use when accurate information exists concerning contractor's costs affected by the change
- Net change to contract value is calculated as:

$$N = A - D + C$$

N = Net change in contract value

A = Current estimate to complete added work

D = Current estimate to complete deleted work

C = Actual cost of deleted work already performed

Equitable Adjustment

Jury Verdict

- Use this approach when costs cannot be segregated and identified for reasonable cost analysis
 - Reliance on available facts and expert opinion
- Not a formal court room, but useful when:
 - Clear evidence that an adjustment is appropriate
 - Not enough information to use reasonable cost approach
 - Lack of cost information is not unreasonable
 - Convincing evidence of costs affected
 - Reasonable basis for judgement

Equitable Adjustment

Total Cost

- Contract value change is the difference between the original contract price and the actual cost of performing the changed contract
- Use this approach when:
 - Clear evidence that an adjustment is appropriate
 - Impractical to use another approach
 - Lack of cost information is not unreasonable
 - Realistic base for adjustment
 - Reasonable total cost
 - Contractor not responsible for added cost

Equitable Adjustment

Total Cost, cont'd

Four elements that must be present to use Total Cost method:

1. Nature of loss makes it impossible or highly impracticable to determine it with a reasonable degree of accuracy.
2. Original bid or estimate was reasonable
3. Actual costs are reasonable
4. Contractor is not responsible for added expense

Equitable Adjustment

Reasonable Value

- Replaced by the reasonable cost method

Equitable Adjustment

Cost Issues

- Be aware of contract clauses that may limit types of costs to be considered
- When estimating direct impact costs, consider the following:
 - Cost of added work (yet to be performed) should be the current best estimate
 - Cost of added work already performed should be the reasonable actual cost
 - Cost of deleted work (yet to be performed) should be the current best estimate
 - Cost of deleted work already performed must be retained in the contract price

Equitable Adjustment

Cost Issues, cont'd

- Cumulative-impact costs
 - Costs that are unforeseeable at time of an initial equitable adjustment
- When evaluating a request for equitable adjustment for cumulative-impact costs, consider
 - Need for separate adjustment
 - Unforeseeable effect of numerous modifications
 - Unforeseeable effect of a single modification
 - Effect on modified contract only

Equitable Adjustment Cost Issues, cont'd

- Consider the following when estimating the effect of the contract change on indirect costs:
 - Forward Pricing Rate Agreements
 - Forward Pricing Rate Recommendations
 - Audit recommended rates

Equitable Adjustment

Profit / Fee Issues

- Before allowing profit / fee on an equitable adjustment, ensure contract clauses allow it (e.g. FAR 52.242-14(b) does not)
- Use the same rationale to establish the profit / fee on added similar work and as was used on deleted work
- May use the basic contract profit / fee rate as negotiation objective rate when:
 - Modification for same type and mix of work as basic
 - Relatively small dollar value compared to basic
- Be sure to consider incurred costs when evaluating risk with respect to profit / fee

Equitable Adjustment Analysis and Negotiation Process

Step 1. Assure that the contractor has provided any required cost or pricing data or information other than cost or pricing data in a format suitable for analysis. (A proposal is a must)

Equitable Adjustment Analysis and Negotiation Process, cont'd

Step 2. Request technical and / or audit support required to support proposal analysis. If you need field pricing support, ensure that your request includes a list of any significant contract events which may aid in the analysis of the proposal.

Equitable Adjustment Analysis and Negotiation Process, cont'd

- FAR 43-204 suggests the following accompany a request for assist audit:
 - Date and dollar amount of the contract award and / or modification.
 - Date of submission of the initial contract proposal and dollar amount.
 - Date of alleged delays or disruptions.
 - Performance dates as scheduled at date of award and / or modification.

Equitable Adjustment Analysis and Negotiation Process, cont'd

- FAR 43-204 list cont'd:
 - Date entitlement to an equitable adjustment was determined.
 - Date of certification of request for adjustment if certification is required.
 - Dates of any pertinent Government actions or other key events during contract performance which may have an impact on the contractor's request for equitable adjustment.

Equitable Adjustment Analysis and Negotiation Process, cont'd

- Step 3.** After technical and/or audit support is received, determine if fact-finding is required to support resolution of identified issues. In determining the need for fact-finding, consider the:
- Complexity of the issues involved.
 - Technical complexity of the requirement.
 - Dollars involved.

Equitable Adjustment Analysis and Negotiation Process, cont'd

Step 4. Establish your negotiation objective based on the contractor's proposal and other available information. Document and coordinate your objective in accordance with agency procedures. Depending on the circumstances, your objective may be an increase, a decrease, or no change in contract price.

Equitable Adjustment Analysis and Negotiation Process, cont'd

Step 5. Conduct negotiations.

During negotiations remind the contractor of the importance of providing current, accurate, and complete data, especially when the contractor is incurring contract costs while negotiations are in progress.

Equitable Adjustment Analysis and Negotiation Process, cont'd

Step 6. Use a bilateral contract modification to document agreement on an equitable adjustment. If the modification definitizes a change order, assure that the modification includes a release similar to the following:

In consideration of the modification(s) agreed to herein as complete equitable adjustments for the Contractor's _____ (describe) _____ "proposal(s) for adjustment," the Contractor hereby releases the Government from any and all liability under this contract for further equitable adjustments attributable to such facts or circumstances giving rise to the "proposal(s) for adjustment" (except for _____). [See FAR 43.203]

Equitable Adjustment Analysis and Negotiation Process, cont'd

Step 7. If you cannot reach agreement on a fair and reasonable price, issue a unilateral change administratively changing the contract price to a figure that you can support as being fair and reasonable. Advise the contractor that it has the right to pursue a claim under the Disputes clause.

Equitable Adjustment Cost or Pricing Data

- Do not require cost or pricing data if one of the following applies:
 - Price analysis clearly demonstrates that the proposed price is reasonable when compared to current or recent prices for the same or similar items;
 - Prices are set by law or regulation;
 - A commercial item contract modification does not change a commercial item to a non-commercial item; or
 - Head of the contracting activity has waived requirement for cost or pricing submission

Equitable Adjustment Cost or Pricing Data, cont'd

- When determining whether or not to request cost or pricing data, sum the related increases and decreases in contract value
- Cost or pricing data may be required if all of the following apply:
 - Absolute value of the increases and decreases exceed \$500K;
 - No exception to requiring cost or pricing data applies; and
 - Head of the contracting agency authorizes the requirement for cost or pricing data

Equitable Adjustment Clauses Allowing Equitable Adjustments

- FAR 52.245-2, Government Property (Fixed Price Contracts)
- FAR 52.245-5, Government Property (Cost-Reimbursement, T&M, or Labor Hour Contracts)
- FAR 52.245-4, Government Property (Short form)
- FAR 52.242-14, Suspension of Work
- FAR 52.242-15, Stop Work Order
- FAR 52.242-17, Government Delay of Work

Equitable Adjustment FAR 52.245-2 and -5, Gov't Property

- The contractor may be due an equitable adjustment if:
 - The property is not delivered on time
 - The property is received in a condition not suitable for its intended use
 - The property is decreased or substitute property is provided
 - The gov't fails to repair or replace property for which the gov't is responsible

Equitable Adjustment

FAR 52.245-4, Gov't Property (Short Form)

- The contractor may be due an equitable adjustment if:
 - That property, suitable for its intended use, is not delivered to the contractor

Equitable Adjustment

FAR 52.242-14, Suspension of Work

- The contractor may be due an equitable adjustment if:
 - Performance on the contract is, for an unreasonable time, suspended, delayed or interrupted:
 - By an act of the Contracting Officer, or
 - By the Contracting Officer's failure to act within the time specified in the contract

Equitable Adjustment FAR 52.242-15, Stop-Work Order

- The contractor may be due an equitable adjustment if:
 - The stop-work order results in an increase in the time required for performance of the contract; and
 - The contractor asks for an adjustment within 30 days after the end of the work stoppage

Equitable Adjustment

FAR 52.242-17, Gov't Delay of Work

- The contractor may be due an equitable adjustment if:
 - Performance on the contract is delayed or interrupted:
 - By an act of the Contracting Officer not authorized by the contract; or
 - By the Contracting Officer's failure to act within the time specified in the contract

Equitable Adjustment Summary

- Contractor must certify to the accuracy of the request for equitable adjustment
- A proposal is required
- Numerous methods available to evaluate the contractor's request
- Several contractual instances could result in an equitable adjustment
- Be aware

Equitable Adjustment

Frequently Asked Questions

- Who can initiate a request for equitable adjustment?
 - In the case of differing contractual conditions or a claim, the contractor initiates the request
 - In the case of an overt change to the contract, realistically, the PCO initiates a request for equitable adjustment when requesting a proposal for an ECP

Equitable Adjustment Frequently Asked Questions

- How does the use of IPT Pricing affect the scope and price of equitable adjustments?
 - IPT Pricing requires early and frequent communication between the Government and the Contractor to ensure that the right decisions are made early in the acquisition cycle, and should serve to enhance the equitable adjustment process.